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IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The principal purpose of this brief is to reply to the government's contention (G. Br. 26-32)[1] that the judgment below may be sustained irrespective of the unconstitutionality of Section 9(h) of the Taft-Hartley law.[2]

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[1] References to the government's brief are given as above ("G. Br."), to the petitioners' brief as "P. Br.", and to the printed record as "R."

[2] See the prior discussion of this point in our brief (P. Br. 20, n. 15), and in the government's brief in opposition to the petition for certiorari (at pp. 10-13) and our reply thereto (at pp. 3-4). The government contends (G. Br. 32, n. 11) that this argument is not foreclosed by the terms of the Court's order granting certiorari; however that may be, the government's suggestion that the Court cannot here decide the constitutional question "without rendering an advisory opinion" is quite groundless, inasmuch as the Court has on many occasions, by a limited grant of certiorari, excluded non-constitutional questions the resolution of which might have made a disposition of the constitutional questions unnecessary. See, e.g., *Dennis* v. *United States*, 341 U. S. 494, 495-96.

In addition, we comment briefly on the government's arguments addressed to each of the three principal questions included in the Court's order granting certiorari.

I. *Statutory Insufficiency of the Indictment.* The government describes petitioners' argument as based on the premise that the two clauses (i.e., the "offense" clause and the "fraud" clause) of the general conspiracy statute (18 U. S. C. 371) are "mutually exclusive" (G. Br., 13). This is truly remarkable, inasmuch as petitioners' brief is explicitly based on the proposition that the two clauses are *not* mutually exclusive, and that a conspiracy embodying the elements of both clauses (i.e., both statutory offense and fraud) may be charged under either or both clauses (P. Br., 11, 12).

But if the conspiracy as charged embraces the elements of only one of the two clauses, then it must be laid under that clause. In the present case the indictment admittedly charges an offense under 18 U. S. C. 1001 as the unlawful element of the conspiracy; the charge therefore lies under the offense clause, and would also lie under the fraud clause *if* fraud is an essential element of the offense. However, this Court has said and lower courts have held that fraud is *not* an element of that offense, and no doubt that is why petitioners' references (P. Br., 7, 12) to *United States* v. *Grainger*, 346 U. S. 235, 242-43, are greeted by the government with silence.

That it is the substance and not the verbiage of the indictment that governs was established in *Bridges* v. *United States*, 346 U. S. 209, and the government's efforts to distinguish that case (G. Br., 16-17) are futile. Of course it is true that the conspiracy as charged here involved not only filing the false affidavits but also obtaining thereby NLRB certificates of compliance and utilizing the Board's procedures (G. Br., 15). But these "fruits" are of no pertinence to the legal issue; people seldom

make false statements for the pure joy of it. As well might one say that in the *Bridges* case the conspiracy charged in the indictment included (as in fact it did) not only the false statement, but obtaining naturalization as well. The question, as the *Bridges* case makes clear (346 U. S. at 223-24), is not whether fraud is described in the facts as charged, but whether it must be proved as an element of the offense constituting the unlawful element of the conspiracy.[3]

Arguing that the government was defrauded in fact, it is denied (G. Br., 21) ". . . that Congress wished to confer the Board's services on unions whose officers filed affidavits, even if the affidavits were false." But, under Section 9(h) as construed by this Court in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145, that is just what Congress *did* want; if officers filed false affidavits, the union was to have compliance status and the officers were to be prosecuted for filing false affidavits, as indeed one of these petitioners was. *Travis* v. *United States*, 364 U. S. 631.

Finally, the government argues that the petitioners have not been prejudiced by the insufficiency of the indictment, any more "than any defendant who is charged with a greater offense and convicted of a lesser included one" (G. Br., 24). But the attempted analogy does not fit.[4] Petitioners have been charged with conspiracy to defraud and convicted of conspiracy to defraud under an indict-

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[3] The district court's comment (R., 14), quoted by the government (G. Br., 17), that ". . . use of allegedly false non-Communist affidavits was only an incident of the conspiracy" is strange at best, for the affidavits' falsity is the only unlawful feature of the facts alleged. Had the affidavits been true, or had none been filed, there would have been no conspiracy whatsoever.

[4] Furthermore, the "offense" clause of 18 U. S. C. 371 is not "included" in the "fraud" clause; each clause involves an element which the other lacks.

ment the allegations of which establish only a conspiracy to commit an offense, as if (to follow out the government's "greater" and "lesser" assumption) a defendant were charged with and convicted of robbery under an indictment the specific allegations of which established only larceny. Indeed, the prejudice[5] in the present case is compounded, for petitioners were convicted of conspiracy to defraud with instructions to the jury under which fraud did not have to be proven (P. Br., 10).[6]

Finally, if one were to indulge the government's erroneous assumption that petitioners' conviction can be regarded as based on the "offense" clause of 18 U. S. C. 371,[7] surely such a conviction, under an indictment plainly charging a conspiracy under the "fraud" clause, would be invalid as lacking in due process of law. *Cole* v. *Arkansas*, 333 U. S. 196.

II. *Constitutional Insufficiency of the Indictment.* The government's arguments in support of the constitutionality of Section 9(h) of the Taft-Hartley law (G. Br. 33-38), based *ex necessitate* on efforts to distinguish *United States* v. *Brown*, 381 U. S. 437, and *Aptheker* v. *Secretary of State*,

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[5] The other prejudicial factors (P. Br., 16-17) are ignored by the government. For an illustration of a district judge's assessment of the conspiracy under the "fraud" clause as a crime of exceptional gravity, see *United States* v. *Belisle*, 107 F. Supp. 283, 286-87 (W. D. Wash. 1951).

[6] See *United Mine Workers* v. *Gibbs*, — U. S. —, 61 LRRM 2561, 34 L. W. 4335 (Mar. 28, 1966), in which the trial court's failure to instruct the jury that they must find the conspiracy related to "violence and threats of violence", rather than to mere "unlawfulness", was one of the grounds for reversal of the judgment.

[7] The judgments of conviction are explicitly based on "the offense of conspiracy to defraud the government of the United States of America" (R. 23-28).

378 U. S. 500, are half-hearted at best.[8] Faced with the insuperable obstacle of these decisions, the government has shifted its *Schwerpunkt* to the contention that the petitioners, since they are accused of filing false affidavits under Section 9(h), are not entitled to challege the constitutionality of that law (G. Br. 26-32).

The position now taken by the Solicitor General is based on the proposition that the government may put wholly unauthorized questions to a person, and force him to a choice between disclosure of information to which the government is not entitled, or litigation to challenge the validity of the inquiry (G. Br. 32). The dangerous consequences of this proposition are obvious, but apparently not to the Solicitor General.[9]

In support of its argument, the government relies in the first place on an attempted analogy to "a claim which might be made by a witness who is prosecuted for giving a false answer to a question to which he could have invoked the constitutional privilege against self-incrimination" (G. Br. 26). Of course it is true, as the government says (quoting the rule as stated in *Glickstein* v. *United States*, 222 U. S. 139, 142), that waiver of the privilege not to answer confers no license to answer falsely.

But the analogy fails because, in the *Glickstein* situation, the authority to ask the question is incontestable, whereas

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[8] Concerning attainder, the government's attempted distinction between criminal sanctions and "discouragement" (G. Br. 33-35) finds no support in either the majority or minority opinions in the *Brown* case. Concerning the First and Fifth Amendments, whether or not the right to serve as a union officer (or to vote for one) be of dignity equal to that of the right to travel (G. Br. 36), it is certainly no more susceptible to limitations that infringe First Amendment rights (P. Br. 32-33). See the opinion of the Court of Appeals in the *Brown* case (334 F. 2d 488, at 493-96).

[9] See our reply (p. 4) to the government's brief in opposition to the petition for certiorari, raising questions to which the government remains oblivious.

in the present case that authority is the very point at issue. The privilege against self-incrimination is unrelated to the issue of legal authority to put the question, as has always been recognized;[10] indeed, that is why testimony may be compelled, despite the privilege, if a sufficient immunity is granted.[11] In the *Glickstein* case itself this Court recognized that (222 U. S. at 141): "... the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony...." If that power is lacking—as it is here if the government had no constitutional power to call for the affidavits in which the alleged false statements were made—then the power to punish the falsity is likewise lacking.[12]

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[10] E.g. *Emery's Case*, 107 Mass. 172, 184 (1871): "It is to be observed that the provision [i.e. the protection against self-incrimination embodied in the twelfth article of the Massachusetts Declaration of Rights] relates to the privileges of the subject, and not to the auhority of any tribunal or body before which inquisition may be made. It places a limit upon all inquiry to which he may be subjected, not by defining the extent of the authority by which it is made, but by surrounding him with a privilege of exemption, which cannot be set aside by any authority without his own consent."

[11] *Ullmann* v. *United States*, 350 U. S. 422; *Brown* v. *Walker*, 161 U. S. 591.

[12] The cases involving perjury before grand juries, where the accused was unaware of his privilege against self-incrimination (G. Br. 27-28), add nothing to the government's argument, for there, too, there was unquestioned authority to put the questions to the witnesses. Nor is *United States* v. *Williams*, 341 U. S. 58, 66-69 (G. Br. 27) any closer to the point, for a defect in the indictment does not deprive the court of its judicial power to hear and determine the case, or its correlative power of testimonial compulsion. If the tribunal totally lacks jurisdiction the result is different, and false testimony is not perjurious. *United States* v. *Williams*, *supra*, at pp. 66-67; *United States* v. *Winter*, 348 F. 2d 204, 210 (C. A. 2d 1965); *Brown* v. *United States*, 245 F. 2d 548 (C. A. 8th 1957) (grand jury); *United States* v. *Iccardi*, 140 F. Supp. 383 (D. D. C. 1956) (Congressional committee). All these cases are so remote from the point here at issue—*i.e.* when the authority to ask the question is challenged—that it is difficult to see why the government troubled

For the second branch of its argument, the government relies on *United States* v. *Kapp*, 302 U. S. 214 and *Kay* v. *United States*, 303 U. S. 1 (G. Br. 29-32) and a handful of comparable decisions in the lower federal courts (G. Br. 28, n. 8). It is true that in these cases (unlike those just previously noted) questions of governmental authority were raised, but they are likewise inapplicable to the present case.

Neither the *Kapp* case nor the *Kay* case involved a challenge to the particular statutory provision under which the sanction for falsity was imposed. Both involved broad challenges to the statutory framework of the operation in which the government was engaged. In the *Kapp* case, the Agricultural Adjustment Act as a whole had been held invalid as beyond the scope of federal power in *United States* v. *Butler*, 297 U. S. 1. In the *Kay* case, as Chief Justice Hughes remarked in his opinion (303 U. S. at 6): "Petitioner's main argument is that the whole scheme of the statute [the Home Owners' Loan Act] is invalid. . . ."

In the present case, on the other hand, petitioners are not challenging the validity of the Taft-Hartley law (or the underlying National Labor Relations Act) as a whole; the challenge[18] is directed specifically and exclusively to Section 9(h), under which the affidavits are required under penalty of union non-compliance and under the incorporated sanction of 18 U. S. C. 1001.

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to cite them, especially since the offense under 18 U. S. C. 1001 is not technically perjury (no oath, etc.). If treated as perjury, the prosecution here would fail, since the false statements, under the *Leedom* case, *supra*, were not material to any issue that the NLRB was authorized to determine.

[18] It is curious vocabulary that the government uses in complaining that petitioners should not be allowed to "test" the constitutionality of Section 9(h) in this proceeding (G. Br. 28-29, 32). Petitioners, of course, did not seek to "test" anything, and are simply endeavoring to defend themselves against a criminal charge laid under an unconstitutional statutory requirement.

This basic distinction was noted and accepted by the government and acted on by this Court in the *Kay* case itself. In its brief in this Court (No. 991, Oct. Term, 1936, p. 64), the government explicitly disavowed any contention that the defendant was not entitled to challenge the sanction-imposing sections of the Home Owners Loan Act.[14] And this Court acted on the distinction thus suggested, for it declined only to consider the validity of the "other provisions" of that Act authorizing the operations of the Home Owners Loan Corporation, and it *did* consider (and rejected) the defendant's challenge to Section 8(a) of the Act, embodying the sanction (303 U. S. at 7).[15]

Quite apart from the foregoing consideration, however, it is obvious on the fact of the matter that the *Kapp* and *Kay* cases involve sanctions where the defendant went to seek a bounty or benefit from the government, and used a false statement to his own profit, rather than in response to government compulsion or pressure. The government, acknowledging that this is true, attempts to brush this crucial factor aside (G. Br. 31) by suggesting that it was not "adverted to" in the opinions of the Chief Justice in those cases.

But in fact it *was* adverted to, both by the government and the Court. In its brief in the *Kay* case, the government argued explicity No. 991, Oct. Term, 1936, Govt.

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[14] "It should be noted that we do not argue that petitioner is estopped to challenge the validity of Sections 8(a) and 8(e), under which she was convicted. We urge only that the rule . . . precludes petitioner from assailing the other provisions of the statute, under which she has sought benefits" (Govt. Brief in No. 991, Oct. Term, 1936, at p. 64).

[15] The same distinction is applicable to several of the other cases cited by the government, e.g., *United States* v. *Barra*, 149 F. 2d 489, 490 (C. C. A. 2d); *Boehm* v. *United States*, 123 F. 2d 791 (C. C. A. 8th, 1941); *Ogden* v. *United States*, 303 F. 2d 724, 730-31 (C. A. 9th, 1962); *United States* v. *Meyer*, 140 F. 2d 652 (C. C. A. 2d, 1944).

Brief in Opp. to Cert. at p. 7) that the petitioner had "invoked the statute for purposes of profit to her business and yet seeks now to reject its penal provisions as unconstitutional."[16] In his opinion in the *Kapp* case, Chief Justice Hughes summarized the holding as follows (302 U. S. at 218): "Such questions cannot be raised by those who make false claims against the Government". In support, he cited four lower federal court cases, all of which involved the use of false statements in pursuit of government benefits or bounties.[17]

But the force of the distincton surely does not rest on precedent alone. It is an altogether different situation from those involved in the *Kapp* and *Kay* cases when an individual, seeking nothing from the government, is confronted with an unauthorized and constitutionally invalid demand for information.[18] *Cf. United States* v. *Iccardi*, 140 F. Supp. 383 (D.D.C. 1956).

This country has been passing through periods of intense turbulence and controversy in the field of civil liberties and civil rights. Legislatures and public officials opposed to libertarian trends have been prolific and ingenious in devising governmental machinery to obstruct, harass, and oppress racial minorities and those active in

[16] In its main brief in the *Kay* case (at p. 62) the government distinguished licensing cases where the applicant sought no benefit, and where the statute "merely delimits the freedom to engage in business."

[17] *Langer* v. *United States*, 76 F. 2d 817 (Federal Emergency Relief Act); *Madden* v. *United States*, 80 F. 2d 672 (C. C. A. 1st) (Civil Works Administration); *United States* v. *Harding*, 81 F. 2d 563 (Public Works Administration); *United States* v. *MacDonald*, 10 F. Supp. 948 (Agricultural Adjustment Administration).

[18] There can be no reasonable suggestion that petitioners here were obtaining a "benefit" from the government. As Chief Justice Vinson pointed out in the *Douds* case, 339 U. S. 382, the Taft-Hartley law imposed "a number of restrictions which would not exist if the Board had not been established" (P. Br. 24, n. 22).

behalf of civil rights. Disclosure of identities and financial sources is often a potent weapon for these purposes.

If election officials unlawfully require voter registrants to disclose their race, educational attainments, or other matters, could persons prosecuted for false answers not challenge the validity of the questions? If regular income tax exemptions were made conditional upon a statement that the signatory was not of a particular religious persuasion, could he be prosecuted for making a false response?

No doubt the approved and respectable course, when confronted with informational demands of dubious validity, is to make full disclosure or openly challenge the authority. But many lack the money, time, energy, or will to engage in litigation with the government, yet fear the consequences of disclosure. Under such circumstances, will this Court now say that every man must face the choice in the terms proposed by the government here? The result, we earnestly suggest, would be to lay the basis for oppressive and unlawful inquisitions which many would be or feel helpless to resist.

III. *Grand Jury Testimony.* A. Our opening brief (P. Br. 38-47) argued that the showing of "particularized need" required by *Pittsburgh Plate Glass*, 360 U. S. 395, was made with respect to prosecution witnesses Locke, Fikes, Gardner and Mason,[19] and hence that their relevant

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[19] The government argues (G. Br. 50, n. 17) that as to Mason, the Court declined to review this issue when it limited its grant of certiorari. "Obviously", says the government (*ibid.*) "the trial court could not have erred, at this second trial, in declining to order production of Mason's grand jury testimony for the purpose of cross-examining him."

Of course, Mason, then dead, could not be cross-examined on the second trial. But we included Mason as one of the witnesses involved in this issue because on the second trial the defense objected to the admission of his first trial testimony on the ground that the denial of the motion for his grand jury testimony on that trial had

grand jury testimony should have been produced directly to the defense. The government makes no reply to our analysis of the criteria of particularized need which appear from *Pittsburgh Plate Glass* or to our demonstration that they were satisfied in this case. Instead, it would have the Court abandon these criteria, repudiate *Pittsburgh Plate Glass*, and permit production directly to the defense only if the prosecutor represents that secrecy is no longer warranted or if the witness admits that "his testimony in open court is materially different from the testimony he gave the grand jury." (G. Br. 41).

The suggestion that prosecutors should be the ones to decide when secrecy is no longer warranted would transfer to them the power now exercised by the district judges under Rule 6(e) of the Rules of Criminal Procedure and would vest in a prosecutor the authority to decide whether the defense should have access to an important source of evidence already available to him.

The proposal that the defense get the minutes only when they are admittedly inconsistent with the witness' direct testimony flies in the face of the statement in *Pittsburgh Plate Glass*, at 400-01, that a showing of inconsistency is not required. Furthermore, the proposal would give the minutes to the defense only when it had no need

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denied the defense of its full right of cross-examination. This was made clear in our petition for certiorari (p. 13, n. 11; p. 15, n. 16). However, any doubt about the state of the record on this matter is resolved by Rule 40(d)(1) of this Court, which provides that the statement of a question presented "will be deemed to include every subsidiary question fairly comprised therein."

The government also says (*ibid.*) the question with respect to grand jury minutes in Mason's case "is the same as Question 5(b) of the petition", which related to erroneous rulings under 18 U. S. C. 3500 at the first trial with regard to Mason's statements. This is absurd. The Court did deny certiorari on Question 5(b), so Section 3500 *is* out of the case. But that does not eliminate the discrete question as to grand jury testimony, including Mason's.

for them. (P. Br. 49; *Parr* v. *United States*, 265 F. 2d 894, 903 (C. A. 5th) rev'd on other grounds, 363 U. S. 370; *Simmons* v. *United States*, 308 F. 2d 324, 325-26 (C. A. D. C.)).

B. In our opening brief, we suggested (P. Br. 50-53) that *Pittsburgh Plate Glass* should be reconsidered in light of developments since it was decided and that relevant grand jury testimony of a prosecution witness should be produced to the defense on its request and without any preliminary showing. Instead of meeting our arguments, the government now repeats the contention in its brief in *Pittsburgh Plate Glass* (pp. 35-36) that the legislative history of the Jencks statute shows that Congress was "opposed to the mechanical disclosure of grand jury minutes . . ." (G. Br. 40) and that, therefore, if *Pittsburgh Plate Glass* is to be re-examined, it should be by amendment of the Rules of Criminal Procedure (G. Br. 41). The legislative history in this respect shows only that the *Jencks* statute was intended to have no effect one way or the other on the production of grand jury testimony[20] and neither of the opinions in *Pittsburgh Plate Glass* even felt it necessary to deal with this argument of the government's.

C. As for *in camera* inspection, the government argues (G. Br. 42-42), that the Second Circuit practice of automatic inspection upon a defense request should not be adopted and that the trial judge should have discretion to decide whether to make the inspection. Among the factors to be weighed by him are "the nature and significance of the witness' testimony and the likelihood that

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[20] The Appendix to the Senate Report to which the government refers (G. Br., 40 states that this is a matter governed by Rule 6(e) of the Rules of Criminal Procedure. S. Report No. 981, 85th Cong., 1st Sess.

grand jury testimony could be of use to the defense." (G. Br. 43.)

Contrary to *Pittsburgh Plate Glass*, then, the government would make "particularized need" the test for *in camera* inspection, not for direct production. Even so, the government agrees with the court of appeals (G. Br. 42) that it would have been "safer" in this case for the district judge to have made the *in camera* inspection and, in fact, speculates (G. Br. 44-45) that he probably would have done so if the petitioners had made the showing to him they have now made to this Court. This speculation rests on the premise that the trial judge indicated a readiness to read the minutes if an adequate showing were made to him (G. Br. 44-46).

This premise is not supported by the record. As we pointed out in our opening brief (P. Br. 52, n. 56), the trial judge exhibited great impatience with the request when made in the case of Locke, the first of the witnesses in question. He did not want the trial stretched out "for three or four months"; if reading the minutes were not "too burdensome or too onerous", he would be willing to read them, but "if I find I have got to read volumes and volumes, I am not going to do it until a higher Court tells me I have to." (R. 65-66)

Furthermore, the showing that the defense made was more than sufficient. To begin with, each of the witnesses was a key witness—an important element of "particularized need" (P. Br. 38). This the trial judge knew anyway from having sat on the first trial when all four witnesses testified. Furthermore, in the cases of both Locke and Fikes, the defense pointed out the possibility of inconsistencies at some length (R. 64, 256). In renewing the motions after Fikes' cross-examination, the defense also referred to his impeachment on cross-examination (R.

309).[21] In any case, after the trial judge had declared that he would not examine the minutes "until a higher Court tells me I have to", the defense had little to gain from further elaboration and argument.

D. The government, in conclusion, concedes in effect that the trial judge should have examined the grand jury testimony of the witnesses, and argues that the Court should not order a new trial but remand for such an examination now (G. Br. 51-52).

The government has made no serious effort to answer the argument of our brief (P. Br. 52-53) that inspection

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[21] The government recognizes (G. Br., 48) that on cross-examination, Fikes admitted lying on several occasions in the past (P. Br., 43), but says that the defense did not even cross-examine Fikes and Lawrence about the differences in their testimony about the meeting in Bessemer in 1949 involving the petitioner Wilson. Whether the defense employed proper tactics in this regard is beside the point. Equally irrelevant is the emphasis the government places on the differences between Fikes' testimony and Lawrence's. The startling difference was between Fikes and Fikes (P. Br., 42), and this *was* pointed out to the trial judge (R., 256). On the first trial, it was in Wilson's mouth that he placed the most incriminating statement in the case—that the letters of resignation from the Communist Party would be "phoney". On the second, it was a Party official who said that the letters "would be on paper, only", while Wilson said that once they had resigned from the Party, none of the officers of the Union "could have any connection with the Communist Party".

With respect to Gardner, the government's statement of the case gives a demonstration of the need for the grand jury testimony of prosecution witnesses. The government quotes Gardner's testimony that, in 1951, the petitioner Travis said that his resignation from the Party in 1949 "was recognized pretty much as a subterfuge . . ." (G. Br., 7). But we pointed out in our brief (P. Br., 43-44) that in 1958 and 1960, Gardner had given three different versions of what Travis had said in 1951, none of them with incriminating overtones. By limiting its discussion of Gardner's testimony to the only one of the four versions which was incriminating, the government illustrates the need of discovering what version Gardner had given the grand jury in 1956.

of grand jury minutes by the trial judge is not a satisfactory alternative to production directly to the defense. If the Court agrees that direct production was required here either under the standard of *Pittsburgh Plate Glass* or because it should be granted on request, the appropriate disposition of the case will be by a reversal for a new trial.

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